

83-1050

Office-Supreme Court, U.S.
FILED

DEC 23 1983

ALEXANDER L. STEVAS,
CLERK

No. 83-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

PHILLIP EMRICH and ERIC GILLBERG,
Petitioners,

vs.

TOUCHE ROSS & CO.,
Respondent,

PHILLIP EMRICH and ERIC GILLBERG,
Petitioners,

vs.

SAM BATTISTONE, SR., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

NORMAN A. STOLL
N. ROBERT STOLL
JUDITH L. NEUSTADTER
Counsel of Record

STOLL & STOLL, P.C.
735 SW First Avenue
Portland OR 97204

Counsel for Petitioners

(Additional Counsel Are Listed Following
the Signature Page)

QUESTIONS PRESENTED

1. May a party's chosen counsel be automatically disqualified solely because of a prior representation by co-counsel of an adverse party?

2. Can members of a putative class be forever barred from suing a party solely because a former counsel for a class representative in a related class action agreed with that party that he would not sue the party even if such agreement was not approved by the court and class members were never given notice of such agreement as required by Federal Rule of Civil Procedure 23(e)?

PARTIES TO THE PROCEEDING

Petitioners Phillip Emrich and Eric Gillberg are the named representatives for a putative class of 375 members in two actions consolidated for argument and decision. The other members of the class are listed in Appendix A hereto. The first action is Phillip Emrich and Eric Gillberg v. Touche Ross & Co., No. 81-5940, D.C. No. CV 81-4104 R, and the second action is Phillip Emrich and Eric Gillberg v. Sam Battistone, Sr., et al, No. 82-5356, D.C. No. CV 81-4547 R. Other defendants in the second action are: Sam D. Battistone, Jr., F. Newell Bohnett, Robert Hild, Owen Johnston, William L. Wagner, Sr., George McKaig, Dan V. Angeloff, George A. Cavelletto, and Bruce N. Anticouni.

These actions were before Judge

Manuel L. Real of the United States District Court for the Central District of California and consolidated before the United States Court of Appeals for the Ninth Circuit.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
JURISDICTION OF THIS COURT	3
STATUTORY PROVISION INVOLVED	4
STATEMENT OF THE CASE	4
REASONS WHY THE WRIT SHOULD BE GRANTED	10
I. THE NINTH CIRCUIT'S DECISION DISQUALIFYING COUNSEL IN <u>TOUCHE</u> AND <u>BATTISTONE</u> CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND DISREGARDS THE RESULTING SUBSTANTIAL DETRIMENT TO PETITIONERS AND OTHER CLASS MEMBERS	10
II. IN EFFECTIVELY DENYING THE PUTATIVE MEMBERS OF THE <u>BATTISTONE</u> CLASS THEIR CAUSE OF ACTION ON THE BASIS OF AN AGREEMENT THAT WAS NOT APPROVED BY THE	

COURT AND NEVER NOTICED TO
 THE MEMBERS OF THE CLASS,
 THE NINTH CIRCUIT IGNORED
 THE RULES OF THE SUPREME
 COURT AND THE CIRCUIT
 COURTS OF APPEAL AS SET
 FORTH IN FRCP 23(e) . . . 22

CONCLUSION	28
APPENDIX A (List of Additional Petitioners)	A-1
APPENDIX B (District Court Order, <u>Touche</u>	A-11
APPENDIX C (District Court Order, <u>Battistone</u>)	A-14
APPENDIX D (Ninth Circuit Memorandum)	A-17
APPENDIX E (Order Denying Rehearing)	A-33
APPENDIX F (Attorney Declarations, <u>Touche</u>)	A-35
APPENDIX G (Attorney Declarations, <u>Battistone</u>)	A-49

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Akerly v. Red Barn System, Inc.,</u> 551 F.2d 539 (3d Cir. 1979) . . .	11
<u>Allegaert v. Perot,</u> 565 F.2d 246 (2d Cir. 1977)	20
<u>Brennan's Inc. v. Brennan's</u> <u>Restaurant, Inc.,</u> 590 F.2d 168 (5th Cir. 1979)	17,19
<u>Community Broadcasting of Boston,</u> <u>Inc. v. Federal Communications</u> <u>Commission,</u> 546 F.2d 1022 (D.C. Cir. 1976)	20
<u>Duncan v. Merrill Lynch, Pierce,</u> <u>Fenner & Smith, Inc.,</u> 646 F.2d 1020 (5th Cir.), <u>cert. denied,</u> 102 U.S. 394 (1981)	17
<u>Fred Weber, Inc. v. Shell Oil Co.,</u> 566 F.2d 602 (8th Cir. 1977), <u>cert.</u> <u>denied,</u> 436 U.S. 905 (1978) . . .	13
<u>Freeman v. Chicago Musical</u> <u>Instrument Co.,</u> 689 F.2d 715 (7th Cir. 1982), rehearing denied	11
<u>Fund of Funds, Ltd. v. Arthur</u> <u>Andersen & Co.,</u> 567 F.2d 225 (2d Cir. 1977)	11,17

<u>Garner v. Wolfinbarger</u> , 430 F.2d 1093 (5th Cir. 1970), <u>cert.</u> <u>denied sub nom, Garner v.</u> <u>First American Life Insurance</u> <u>Co.</u> , 401 U.S. 974 (1971) . . .	19
<u>Government of India v. Cook</u> <u>Industries</u> , 569 F.2d 737 (2d Cir. 1978)	15
<u>In Re Airport Car Rental</u> <u>Antitrust</u> , 470 F. Supp. 495 (N.D. Cal. 1979)	11,20 21
<u>In Re Coordinated Pretrial</u> <u>Proceedings</u> , 658 F.2d 1355 (9th Cir. 1981), <u>cert. denied</u> , 455 U.S. 990 (1982)	12
<u>International Electronics</u> <u>Corporation v. Flanzer</u> , 527 F.2d 1288 (2d Cir. 1975) . . .	21
<u>Kahan v. Rosensteil</u> , 424 F.2d 161 (3d Cir.), <u>cert. denied</u> , 398 U.S. 950 (1970)	24
<u>Mandujano v. Basic Vegetable</u> <u>Products, Inc.</u> , 541 F.2d 832 (9th Cir. 1976)	25
<u>Mendoza v. United States</u> , 623 F.2d 1338 (9th Cir. 1980), <u>cert.</u> <u>denied</u> , 450 U.S. 912 (1981) . .	23

<u>Norman v. McKee</u> , 431 F.2d 769 (9th Cir. 1970), <u>cert. denied</u> , 401 U.S. 912 (1971)	24
<u>Rodgers v. United States Steel Corp.</u> , 70 F.R.D. 639 (W.D. Pa. 1976)	25
<u>Sosna v. Iowa</u> , 419 U.S. 393 (1975)	23
<u>State of Arkansas v. Dean Foods Products Co., Inc.</u> , 605 F.2d 380 (8th Cir. 1979)	11
<u>Susman v. Lincoln American Corp.</u> , 587 F.2d 866 (7th Cir. 1978)	24
<u>Woods v. Covington County Bank</u> , 537 F.2d 804 (5th Cir. 1976)	12,20
<u>Miscellaneous</u>	
28 U.S.C. § 1254(1)	3
Federal Rules of Civil Procedure Rule 23(e)	passim
Graafeiland, <u>Lawyer's Conflict of Interest - A Judge's View</u> (Part II), N.Y.L.J., July 20, 1977, at 1, col. 2	21
Jordan, "Disqualifying Lawyers," Litigation (Litigation Section, ABA), Vol. 7, No. 3, at 3 (Spring, 1981)	15

3B J. Moore, Federal Practice	
¶ 23.80[2] (2d ed. 1982)	. . . 23
3B J. Moore, Federal Practice	
¶ 23.80[2.1] (2d ed. 1982)	. . 24
8 J. Wigmore, Evidence § 2312	
(McNaughton rev. 1961)	. . . 19

No. 83-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

PHILLIP EMRICH and ERIC GILLBERG,
Petitioners,

vs.

TOUCHE ROSS & CO.,
Respondent,

PHILLIP EMRICH and ERIC GILLBERG,
Petitioners,

vs.

SAM BATTISTONE, SR., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered June 30, 1983, upon which petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc was denied. September 27, 1983.

OPINIONS BELOW

In the first action consolidated for argument and decision, Phillip Emrich and Eric Gillberg v. Touche Ross & Co., Judge Manuel L. Real of the United States District Court for the Central District of California granted, on November 2, 1981, defendant's Motion to Disqualify all plaintiffs' counsel and entered a written order on November 9, 1981 dismissing the action, reprinted as Appendix B hereto.

In the second action consolidated for argument and decision, Phillip Emrich, et al v. Sam Battistone, Sr., et al, Judge Real granted defendants' Motion to Disqualify all plaintiffs' counsel on January 18, 1982, and entered a written order on January 25, 1982, amended on February 11, 1982, dismissing that

action, reprinted as Appendix C hereto.

The United States Court of Appeals for the Ninth Circuit consolidated these cases and affirmed Judge Real's orders disqualifying all plaintiffs' counsel in a Memorandum dated June 30, 1983, reprinted as Appendix D hereto, and filed an Order denying petitioners' Petition for Rehearing on September 27, 1983, reprinted as Appendix E hereto.

JURISDICTION OF THIS COURT

The Memorandum of the United States Court of Appeals for the Ninth Circuit was filed on June 30, 1983. The Order denying Petition for Rehearing by the United States Court of Appeals for the Ninth Circuit was filed on September 27, 1983.

The jurisdiction of this court is

invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The rule involved is FRCP 23(e), which provides:

(e) Dismissal or Compromise.

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

In 1980, a group of investors, who in 1978 had purchased securities of Sambo's Restaurants, Inc. ("Sambo's"), retained the law firm of Latham & Watkins ("Latham") to seek rescission of the securities purchases. A class action lawsuit was filed, Muller et al v. Sambo's Restaurants, Inc., et al, No. 80-3757-R ("Muller"), naming as defendants Sambo's and two banks that had financed

the securities offering. The district court subsequently certified Muller as a class action but excluded from the class former Sambo's officers and directors who had also purchased such securities.

In April 1981, Latham resigned as counsel for the Muller plaintiffs, and the law firm of Mullen & Stabile ("Stabile") was substituted as counsel. A few months later, Stabile associated as counsel in Muller the law firms of Stoll & Stoll, P.C. ("Stoll"), Bretz & Hennigan ("Hennigan"), and Law Offices of Josef D. Cooper ("Cooper"). Stoll, Hennigan and Cooper immediately thereafter undertook extensive discovery on behalf of plaintiffs, which had not previously been done.

In August 1981, the day after Hennigan took the deposition of the

auditors for Sambo's (Touche Ross & Co., "Touche"), Stoll, Hennigan, Cooper and Stabile filed the first of the instant actions, Emrich, et al v. Touche Ross & Co., No. 81-4104-R ("Touche"). A few weeks later, Stoll, Hennigan and Cooper, without Stabile, filed the second action before this court, Emrich, et al v. Battistone et al, No. 81-4547-R ("Battistone"), against certain former Sambo's directors who had been excluded from the plaintiff class certified in Muller.

Although Stabile was named as counsel in the action against Touche, the Stabile firm did not actively participate in the Touche case, and has never been plaintiffs-petitioners' counsel in Battistone. Latham has never represented any of the individuals who are the named

plaintiffs-petitioners in either Touche or Battistone.

Touche moved to disqualify Stabile on the grounds that Stabile had represented Touche two years earlier in other unrelated litigation and had allegedly obtained confidential information from Touche regarding its auditing procedures. Touche also moved to have all other plaintiffs-petitioners' counsel disqualified because of either a "presumption" that Stabile had disclosed the allegedly confidential information to co-counsel or the "risk" that Stabile might divulge such information to co-counsel in the future.

Declarations, reprinted as Appendix F hereto, were submitted by Stoll, Hennigan and Cooper stating that no such

confidential communications were disclosed to them. None of these declarations were controverted by any affidavits or other evidence submitted by any party.

The motion to disqualify all counsel was granted by the district court without explanation, and the action was dismissed.

Muller settled shortly after the disqualification order in Touche.

Thereafter, nine of the ten defendants in Battistone moved to disqualify Stoll, Hennigan and Cooper from representing plaintiffs-petitioners in that case. Five of the nine movants submitted declarations that they had given information to Latham (the original counsel in Muller) and had given money to a plaintiffs' committee that had retained

Latham, on the assurance that those five would not be sued. Declarations were submitted, reprinted as Appendix G hereto, by Stabile, Stoll, Hennigan, Cooper, and Latham (by Lance Wickman) to the effect that no confidential information from the Battistone defendants was relayed to them. Defendants submitted no evidence to the effect that any information was given to Stoll, Hennigan or Cooper.

The district court granted the motion, again without explanation, disqualifying Stoll, Hennigan and Cooper from representing plaintiffs-petitioners against all ten of the defendants in Battistone, and dismissing the action. The Battistone plaintiffs-petitioners moved for reconsideration by the district

court, or for an articulation of the basis for such ruling. Reconsideration was denied without explanation or findings of fact or law.

Appeals were taken from the Touche and Battistone rulings and were consolidated for oral argument. The Ninth Circuit panel affirmed the district court's order disqualifying all plaintiffs-petitioners' counsel, and voted to deny petitioners' petition for a rehearing.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE NINTH CIRCUIT'S DECISION DISQUALIFYING
COUNSEL IN TOUCHE AND BATTISTONE
CONFLICTS WITH THE DECISIONS OF OTHER
CIRCUIT COURTS OF APPEAL AND DISREGARDS
THE RESULTING SUBSTANTIAL DETRIMENT
TO PETITIONERS AND OTHER CLASS MEMBERS

The well-established rule provides that, even if one counsel is properly

disqualified because of prior representation of an adverse party, co-counsel are not disqualified solely on the basis of the co-counsel relationship. Some evidence of co-counsel's receipt of confidential information is necessary. See State of Arkansas v. Dean Foods Products Co., Inc., 605 F.2d 380, 388 (8th Cir. 1979); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 235 (2d Cir. 1977); Akerly v. Red Barn System, Inc., 551 F.2d 539, 543 (3d Cir. 1979); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721-22 (7th Cir. 1982), rehearing denied; In Re Airport Car Rental Antitrust, 470 F. Supp. 495, 505 (N.D. Cal. 1979).

If the appearance of impropriety alone provides the basis for disqualification of co-counsel, a

district court's order of disqualification not based on articulable principles cannot be sustained. The appeals court will affirm such orders only where the impropriety is clear and is one that would be recognized as such by all reasonable persons. In Re Coordinated Pretrial Proceedings, 658 F.2d 1355, 1361 (9th Cir. 1981). cert. denied, 455 U.S. 990 (1982). The Ninth Circuit and other circuits apply a balancing test for determining whether a Canon 9 appearance of impropriety exists:

The crucial question is whether the concerns expressed are indeed present or merely anticipatory and speculative. In other words, did the court have a basis for finding apparent improprieties that were serious enough to outweigh the parties' interests in being represented by counsel of their choice?

Id. See also Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978).

The Ninth Circuit Memorandum disregards these general rules; it conclusively presumes the opposite--that confidential information was transmitted and that an impropriety existed--in total disregard of the uncontradicted declarations that no transmittal of information to co-counsel occurred and in total disregard of the legitimate interests of the clients. By upholding the trial court's discretion on so sketchy a record as appears here, the appellate court opens the door to serious abuse of discretion. The effect is equivalent to a conclusive presumption

which is simply contrary to the law.

The Ninth Circuit Memorandum also disregards the detriment to the plaintiffs-petitioners caused by the disqualification of their chosen counsel.

Generally, when ruling on motions to disqualify, courts should give great weight to considerations of the client's right to choose counsel and the harm to the client caused by an order of disqualification. Disqualification orders harm clients, particularly in cases as complex as these, by causing them to incur losses of time and money. Harmed clients are being forced to retain new counsel who must begin anew by familiarizing themselves with the facts and issues of the cases. These clients lose the benefit of retaining long-time

counsel with specialized knowledge of the clients' situation. See Government of India v. Cook Industries, 569 F.2d 737, 739 (2d Cir. 1978); Jordan, "Disqualifying Lawyers," Litigation (Litigation Section, ABA), Vol. 7, No. 3, at 3 (Spring, 1981).

The petitioners herein have been substantially burdened by the disqualification of their counsel by losing as class counsel the attorneys who had familiarity with the complex legal and factual issues involved. Stoll, Hennigan and Cooper were counsel in Muller. Muller involved the same facts as those underlying these actions. Their involvement with Muller extended until the eve of trial, even to the extent of counsel having filed witness and exhibit lists and jury instructions, when the

Muller case was settled; counsel were intimately familiar with these facts through extensive discovery and trial preparation. The individuals who were class members in Muller are the same as those in Touche and Battistone. Stoll, Hennigan and Cooper had developed a certain rapport with the class. Forcing the class to lose their chosen counsel imposes delay in resolution of their claims as well as substantial additional cost.

In the Touche action, before the court could properly have imposed these burdens on petitioners, it should have carefully scrutinized the record to determine whether a substantial relationship existed between Stabile's earlier representation of Touche and his

minimal involvement in one of the cases now before the court, and, if a relationship was found to exist, whether confidences had in fact been disclosed so that Touche was likely to be unfairly disadvantaged. See Fund of Funds, Ltd., 567 F.2d at 227; Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020, 1029 (5th Cir.), cert. denied, 102 U.S. 394. (1981); Brennan's Inc. v. Brennan's Restaurant, Inc., 590 F.2d 168, 173-174 (5th Cir. 1979). And if the court properly disqualified Stabile, that would have given Touche all the protection it needed. given the representations that Stabile never revealed any Touche secrets to co-counsel.

The court also should have determined whether any "confidential

information" given to Latham by the Battistone defendants was shared with Latham's successor attorney, Stabile, and then passed on to Stoll, Hennigan and Cooper, counsel in the Battistone suit. The need for such a determination is especially meaningful where, as here, the disqualification of counsel is the basis of a dismissal order. The putative class members had their action against these defendants' dismissed on this basis without even having had the prior court approval and class notification to which they were entitled under FRCP 23(e) (see II, infra).

The "information" received by Latham was received during a period when Latham jointly represented the petitioners and the Battistone defendants. As a matter

of law, that information would not be confidential as between jointly represented clients. No confidential information can exist between current adversaries who previously were jointly represented by the same attorney. See Brennan's, Inc., 590 F.2d at 173; Garner v. Wolfinbarger, 430 F.2d 1093, 1103 (5th Cir. 1970), cert. denied sub nom, Garner v. First American Life Insurance Co., 401 U.S. 974 (1971). See also, 8 J. Wigmore, Evidence § 2312 at 603-04 (McNaughton rev. 1961).

If confidential information could exist, no facts were presented to support a transmittal from Latham to present counsel. There is no presumption that confidential information passes to successor counsel. Such a presumption does not even exist with regard to

actual, current co-counsel. See In Re Airport Car Rental Antitrust Litigation, 470 F. Supp. at 503. Such a presumption is even less proper here, because Latham could only have conveyed that information by violating its ethical duties as defendants' former counsel.

Courts and commentators have noted that frivolous motions for disqualification have become "common tools" to achieve ulterior and "purely strategic purposes" where there is no real concern that actual prejudice will result from the challenged representation. See Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977); Community Broadcasting of Boston, Inc. v. Federal Communications Commission, 546 F.2d 1022, 1026-27 (D.C. Cir. 1976);

Woods v. Covington County Bank, 537 F.2d at 813; International Electronics Corporation v. Flanzer, 527 F.2d 1288, 1289 (2d Cir. 1975); In re Airport Car Rental Antitrust Litigation, 470 F. Supp. at 503; Graafeiland, Lawyer's Conflict of Interest - A Judge's View (Part II), N.Y.L.J., July 20, 1977, at 1, col. 2.

When courts can simply disqualify counsel without articulating the basis therefor, the policy reasons for balancing the interests involved are subverted and there arises a serious potential for abuse. At a minimum, plaintiffs-petitioners are entitled to have the court set forth clearly its reasons for disqualification of counsel. The complaining parties herein put forth no evidence to satisfy the requirements of disqualification, yet were well aware

of the disadvantages the class would suffer by the loss of counsel intimately familiar with these actions. By permitting conduct such as this, courts open the door to serious abuse of disqualification motions and the inevitable resulting delays.

II.

IN EFFECTIVELY DENYING THE PUTATIVE MEMBERS OF THE BATTISTONE CLASS THEIR CAUSE OF ACTION ON THE BASIS OF AN AGREEMENT THAT WAS NOT APPROVED BY THE COURT AND NEVER NOTICED TO THE MEMBERS OF THE CLASS, THE NINTH CIRCUIT IGNORED THE RULES OF THE SUPREME COURT AND THE CIRCUIT COURTS OF APPEAL AS SET FORTH IN FRCP 23(e)

In order for any settlement of a class action to be effective, Rule 23(e) of Federal Rules of Civil Procedure requires that (i) notice of such settlement be given to the plaintiff class and (ii) the district court approve

such settlement on evidence before it and after notice and hearing. See Sosna v. Iowa, 419 U.S. 393, 399, n. 8 (1975); Mendoza v. United States, 623 F.2d 1338, 1350 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

Rule 23(e) specifically requires notice and approval when class members agree to dismiss their claims against defendants and potential defendants. Such notice and approval were notably absent herein. Notice of a proposed dismissal to members of the class is required in every class action. 3B J. Moore, Federal Practice ¶ 23.80[2] at 23-506 (2d ed. 1982).

This is true even prior to a court's initial determination as to whether an action brought as a class action is to be so maintained; the action is presumed to

be a class action for purposes of Rule 23(e). 3B J. Moore, supra, ¶ 23.80[2.-1] at 23-509. See Kahan v. Rosensteil, 424 F.2d 161, 169 (3d Cir.), cert. denied, 398 U.S. 950 (1970); Susman v. Lincoln American Corp., 587 F.2d 866, 869 (7th Cir. 1978). Court approval is required even for a dismissal as to only some defendants, the action remaining pending as to other defendants. 3B J. Moore, supra, at 23-508.

There are important reasons behind Rule 23(e). Settlements negotiated between named parties may not necessarily protect the interests of unnamed parties. Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971). The strictures of the rule are necessary to protect the rights of absent

and non-party class members who may be bound or affected by a settlement of their claims by the class representatives. Rodgers v. United States Steel Corp., 70 F.R.D. 639, 642 (W.D. Pa. 1976). Rule 23(e) takes on added importance when considering the nature of a class action. As stated by the Ninth Circuit:

[T]he attorney for the class is not to be viewed as a negotiator in a process of collective bargaining where the majority rule prevails. The class is not the client. The class attorney continues to have responsibility to each individual member of the class even when negotiating a settlement.

Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 834-35 (9th Cir. 1976).

Under the facts of the present case, the moving Battistone defendants at best

demonstrated that Latham, while representing Muller and Anzalone (named plaintiffs in Muller), had obtained information from five of what later became the ten defendants in Battistone, upon an alleged oral assurance by Latham that those five individuals would not be sued. Subsequently, Muller was certified as a class action, and the district court excluded from the plaintiff class all former directors as having potential conflicts of interest with Muller plaintiffs.

No one has ever given notice to the plaintiff class in either Muller or Battistone that settlement was reached between class counsel (Latham) and certain former directors to the effect that, in exchange for information, the former Sambo's directors would not be

sued. Actually, Latham denies that there ever even was an attorney-client relationship between Latham and these former Sambo's directors. See Declaration of L. Wickman, Appendix E hereto. Emrich and Gillberg (named plaintiffs herein) were never clients of Latham, although they subsequently became members of the Muller class.

In order to bind Emrich and Gillberg or any other Muller class member to an agreement not to sue certain former Sambo's directors, it would have been necessary, under Rule 23 Federal Rules of Civil Procedure, to provide class notice, hearing, and a determination by the district court as to the reasonableness and adequacy of such agreement. Because none of this occurred, these plaintiffs

cannot be prevented from prosecuting
their claims.

CONCLUSION

The petition for a writ of
certiorari should be granted.

DATED:

NORMAN A. STOLL
N. ROBERT STOLL
JUDITH L. NEUSTADTER
Counsel of Record
STOLL & STOLL, P.C.

By  _____

Norman A. Stoll
N. Robert Stoll
Judith L. Neustadter
Counsel for
Petitioners

ADDITIONAL COUNSEL FOR PETITIONERS

J. MICHAEL HENNIGAN
LAW OFFICES OF J. MICHAEL HENNIGAN
405 N. Roxbury Drive
Beverly Hills CA 90210

JOSEF D. COOPER
TRACY R. KIRKHAM
PATRICIA LEE CONNORS
COOPER, KIRKHAM & MCKINNEY
300 Montgomery Street, Suite 600
San Francisco CA 94104

The following individuals are
members of the putative plaintiff class:

Thomas A. Aagaard
Amir Aghaloo
Tony Akl
Steve Andrew
Richard Andrews
J. Robert Andrews
Barbara Anzalone
Seto Avakian
Joe Avoledo
Richard Baker
Robert Bandich
Richard Bandlely
Charles Barber
Robert Barger
Arden Barlow
Lewis Bass
Charmaine Bauer
Michael C. Baxter
Kenneth Beck
Fred Becker
Chris Benson
Bill Bester
Louis Bevilacqua
Abdul Bhatti
Brian Bly
William Bohnett
Phillip Boyle
Ken Boren
Donald Bowen
John Boylan
Carrol Brady
Rhett Bray
Clarence Brenneman
Ronald Brenneman
Thomas Briggs

Louis Browdy
Jack Brown
Michael N. Bruce
Ritz Brunello
Ludvik Buric
Gary Burk
Craig Burns
Daniel A. Busby
Kenneth Carlson
Lynn Carlson
George Carranco
Pual Carter
Steven Carter
Richard C. Carver
Alfred C. Cascarina
John L. Castaldo
Paul G. Champney
Dennis A. Clairmont
Terry Cokas
Don Cole
Robert Collinsworth
George Comeau
William Comeaux
M. Bruce Cook
David Cornelson
Peter Crawford
Ronald Crews
John Crouch
Domingo Cunanan
John R. Dade
Steve Dalpez
Ricchard Dalton
Jeff Davidson
Joel Davies
Bob Davis
Richard D. Freitas
Tom Derry
Robert G. Dickinson
Ronald Dillon

Annette Dobberphul
Alex Dodds
Don Dolan
Rex Donaldson
Dick Dowd
Roger Duchemin
Edward Dudley
James Duncan
John Duncan
William Dworsky
Michael Eanes
Steve Edson
Robert Elliott
Bon Elmerick
Steve Endicott
Martin Engelman
Dan Esmond
Jiom Evans
Robert Ewing
Don Farris
William D. Fewox
James Fleek
Hans Florin
James Floyd
William B. Foerster
Gerald Fong-Jean
Robert G. Forbes
Donald Ford
Charles Foss
Barbara P. Fraser
Barbara Fraser
Ken Friberg
Robert Friday
Shirley Fuller
Les Fullerton
William Gagg
Mary Gamboa
Mary Gamboa
George Gardner

Bob W. Garner
Tom Garyfallou
Charlotte Gaskill
Raymond Gelinas
Vern Gile
Joseph Gillen
Seymour Goldberg
Manuel Gonzales
Don Grandi
Richard Granieri
Frank Granite
Ron Green
John Gregory
David Gronewoller
Woody Guild
Anthony Gunterman
Arthur Gunther
Arthur Gunther
Huhg Haferkamp
Richard Haines
Noel Hales
Noel Halesa
James A. Hall
Jim Hanke
William Hansen
Steve Hardy
Dennis Harman
Larry Hatfield
Alfred Henry
Pat Henry
Mark Herman
Steve Hill
John Hiltz
James Hobbs
Tom Holgate
Gene Holt
Frank Horne
John Howard
Henry Huber

Floyd Hunter
Abdul Ibrahim
Leon Irons
Richard Irvin
Richard Irvin
Bob Jellum
Dave Johnson
Lee Johnson
Charles Jones
Warren Jost
Gunther Junck
Gary Kasprovicz
Wayne Kees
Craig Kessler
Steve Kirby
Jan Klopp
Bob Knowlen
Gary Kreeck
Robert Kucera
Richard Kurzna
Bernard Kutchinski
Pete La Placa
Dwight E. Lackey
Marvin La Framboise
Robert Lane
Robert Lane
Harold Large
Ray Largura
Howard Larson
Fred Le Claire
Arvan Leany
Vincent Leifer
Peter Lembesis
John Leto
Flo Leutwiler
Richard Lewin
Thommas B. Lewis
Rodney Lincoln
Larry Lindell

James Lonas
William Lorenzo
Don Louie
London Lowman
Kent Lu
Earl Ludwig
Tom Lumsden
Randy Lyle
Hal Lyons
David McAfee
Mike McAllister
Paul McCargar
Terry McCormack
Marvin McElhiney
Kelly McGuire
Charles McIntyre
Robert H. McKenerich
James R. McMahan
Ken Macaulay
Michael MacKenzie
Guy Maddox
John Mangan
H. Marter
Dave Mattingly
Steve Meeker
Ed Meeks
Edward Mercer
Steve Merchant
Russell Merrick
William J. Meyerink
Michael Miller
William A. Milyard
Dorothy Mimms
George Miskovich
James Mitchell
Buck Moorehead
Jorgen Mortensen
Morton Moskowitz
Darrel Mowry

James Muller
Robert Munoz
Sang Nam
Tom Navin
Carlos Negrete
Tom Negrete
Ron Negrete
George Nelson
Leon Nesbitt
Nello Nicioli
Jeffrey Nordstrom
Robert Obici
Tom O'Brien
Forrest O'Neil
Ted Ontiveros
John Opperman
Alan Parsons
Brian Patterson
George Paulson
Curtis Pearce
Thomas Peavey
Jose S. Perez
Augy Perry
James Perry
Paul Peters
Donald Peterson
Walter Pfeffer
Richard Phillips
Benny Plambek
Harvey Pleiman
Howard Pommerening
Ms. Kim Porter
Joe Prevedello
Oscar Price
Herb Purvis
Rodney Putz
Mike Quinn
Louise Ramsey
Mark Randolph

J.T. Rankin
Donald Rast
Ed Rawles
William Reiman
George Reiswig
Jose Reyes
Tony Reynolds
John Reynolds
Richard Rhinesmith
Larry Richins
C.R. Rider
Roy Ridgeway
Robert Robertson
Al Rodin
Joe Rodiguez
William Roe
Pieter Roelofs
Pieter Roeloffs
Brian Rosborough
Jack Rose
Mike Rose
Martin Arthur Ruff
Armand Ruocco
Richard Rush
Dave Rybar
Bob Salcedo
John Sanchez
Kenneth Sarkis
Leonard Scamardo
Norm Scanlon
Gerald L. Scharton
Lee Schlesinger
Emil Schultz
William Schultz
Robert Schurtz
Howard Scott
Bill Scott
Leon Sequeira
Richard Seron

John Shanks
Joseph Shaw
Robert Sheker
Howard Shepherd
P. Shipley
Ilsoon Shinn
Dennis Shoemaker
Julie Shores
Jerry Sigler
Steve Sill
Peter Sirkin
Paul Siverhus
Jeff Smith
Larry Smith
Jack Sopkin
Ron Soteros
Bob Stammer
Arnold Stanfield
Randy Starrett
Don Stathos
Dennis Steed
James Stewart
John Stirling
S.Z. Stoltzfus
Daniel Strout
Dennis Strunk
Ernie Suggett
John Sullivan
Montri Suriyamont
Greg Swehla
Robert Tai
William Tatham
Mark Tharp
Joseph Theriault
Dan Thomas
Phillip Thomas
Gerald Thompson
Pat Tracy
Michael Trainor

Don Turner
Joe Tyler
Ken Underation
Ann Van Heusden
Billy Veenstra
Richard Wacker
Eric Wagner
Bill Wagner Jr.
Charles Walmsley
Nick Weber
Don Weinstock
Charles Wenkus
Larry Wenning
Al West
Mary Weston
John Wheeler
Robert Whitehouse
Kyle Whitley
Booker T. Williams
Robert Williams
William S. Williams
Buzz Wires
Steve Wiseman
Roger Wolfe
Charade Wongsri
Dough Worsley
Mel Worton
John Wright
William Wright
Eugene Wulf
Ted Yang
Al Yoko
Paul Young
Eddie Yuan
John Zanotti

APPENDIX B

A-11

FILED

Nov 9 1981

Clerk, U.S.
District
Court
Central
District of
California

HOWARD P. MILLER, a Member of, and
LORRAINE B. MOURA, an Associate of
BUCHALTER, NEMER, FIELDS, CHRYSTIE
& YOUNGER

A Professional Corporation
700 South Flower Street, Suite 700
Los Angeles, California 90017
(213) 626-6700

RICHARD H. MURRAY
Touche Ross & Co.
1633 Broadway
New York, New York 10019
(212) 489-1600

Attorneys for Defendant Touche Ross
& Co.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND ERIC)	
GILLBERG,	)	No. 81 4104 R
)	
Plaintiffs,	)	ORDER
	)	DISQUALIFYING
TOUCHE ROSS & CO.,	)	LAW FIRMS AND

) STRIKING
Defendant.) COMPLAINT

The Motions of defendant, Touche Ross & Co. to Disqualify Law Firms and to Strike Complaint or in the Alternative to Dismiss Count Four of the Complaint came on regularly for hearing on Monday, November 2, 1981 in the Courtroom of the Honorable Manuel L. Real, Judge Presiding, in the above-entitled Court. Howard P. Miller, a member of, and Lorraine B. Moura, an associate of, Buchalter, Nemer, Fields, Chrystie & Younger, appeared on behalf of defendant and moving party, Touche Ross & Co. Gary D. Stabile of Mullin [sic] & Stabile and Josef D. Cooper, of the law offices of Josef D. Cooper, P.C. appeared on behalf of Phillip Emrich and Eric Gillberg.

After full consideration of the .

papers filed in connection with the motions and the oral argument of counsel, and being fully advised of the premises:

IT IS ORDERED that the defendant Touche Ross & Co.'s, Motion to Disqualify Law Firms is granted as to all law firms representing plaintiffs herein.

IT IS FURTHER ORDERED that defendant Touche Ross & Co.'s Motion to Strike the Complaint is granted without prejudice.

Dated: November 9, 1981.

MANUEL L. REAL

MANUEL L. REAL,
UNITED STATES
DISTRICT COURT
JUDGE

APPENDIX C

A-14

FILED

Jan 25 1982

Clerk, U.S.
District
Court
Central
District of
California

GARY R. RICKS
WILLIAM W. WATTS
PRICE, POSTEL & PARMA
200 East Carrillo Street
Santa Barbara, CA 93101
Telephone: (805) 962-0011

Attorneys for Defendants,
SAM BATTISTONE, SR.;
SAM D. BATTISTONE, JR.;
F. NEWELL BOHNETT; OWEN
JOHNSTON; WILLIAM L.
WAGNER, SR.; GEORGE
McKAIG; and BRUCE N.
ANTICOUNI

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH, et al.,)	
	)	No. CV 81-
Plaintiffs,	)	4547R (JRx)
)	
v.)	
	)	JUDGMENT ON
SAM BATTISTONE, SR.; et	)	DECISION BY
al.,	)	THE COURT

Defendants.)
_____)

This action came on for hearing of Defendants' Motion for Order Disqualifying Law Firms; to Dismiss the Complaint, for Order Enjoining the Representation of Conflicting Interests and the Disclosure of Confidential Information on January 18, 1982 before the Court, Honorable Manuel L. Real, District Judge, presiding. The issues having been duly heard and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED: 1) that the plaintiffs' counsel be disqualified from representing plaintiffs in this action; and 2) that this action be and is dismissed [without prejudice (amended nunc pro tunc, 2/11/82)]; and 3) that the parties shall bear their own costs and

fees incurred herein.

Dated at Los Angeles, California,
this 25th day of January, 1982.

[signed]

MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

APPENDIX D

A-17

FILED

Jun 30 1983

Phillip B.
Winberry
Clerk U.S.
Court of
Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILLIP EMRICH and)
ERIC GILLBERG,)
Appellants,)

No. 81-5940

vs.)

D.C. No.
CV 81-4104 R

TOUCHE ROSS & CO.,)
Appellees.)

PHILLIP EMRICH, et)
al.,)
Appellants,)

No. 82-5356

vs.)

D.C. No.
CV 81-4547 R

SAM BATTISTONE, SR.,)
et al.,)
Appellees.)

MEMORANDUM

Appeal from the United States
District Court for the
Central District of California

District Judge Manuel L. Real, Presiding
Argued and Submitted November 1, 1982

Before: CHAMBERS, ROBB* and ALARCON,
Circuit Judges.

These are related cases which were heard together and sua sponte we decide them in a single Memorandum. Both cases arose out of the issuance of securities of Sambo's Restaurants, Inc. (hereafter "Sambo's"). Both appeals center about the district court's orders dismissing the complaints without prejudice and disqualifying counsel for the class represented by Emrich and Gillberg.

The attempted appeals from the portion of the orders dismissing the actions without prejudice are not from final orders and we are without appellate

* The Honorable Roger Robb, United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

jurisdiction over that aspect of the attempted appeals. However, to the extent the orders relate to the disqualification of counsel, we do have appellate jurisdiction. In re Coordinated Proceedings in Petroleum Products Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981), cert. den. 455 U.S. 990 (1982). We thus direct our discussion to the disqualification issue.

In late 1977, and continuing into 1978, activities were undertaken to issue securities in connection with the expansion of Sambo's Restaurants. Plaintiffs claim to represent a class of purchasers of the securities. The defendants in Battistone formerly served in management positions in Sambo's, but they were also among those who purchased the securities in question. In the early

stages of exploring potential litigation, they were approached and solicited to assist, and did assist, in the financing of the litigation. This was done with specific assurance, from counsel for the class representatives, that they would not be sued. In 1980, an action was filed against Sambo's and certain financing banks, entitled Muller et al v. Sambo's Restaurants, Inc. et al, No. 80-3757-R (hereafter "Muller"). Consistent with the assurances that had been given, none of them was named as a defendant in that action.^{1/}

^{1/} The description of the class in Muller was such that the Battistone defendants could be interpreted as being within the class represented by the plaintiffs; they were forally excluded from the Muller class at a later date. Sambo's has since filed for bankruptcy.

Several months after the filing of the Muller complaint, the class attorneys were substituted out in favor of the law firm of Mullen & Stabile. Soon thereafter Mullen & Stabile associated Josef D. Cooper (now succeeded by Cooper, Kirkham & McKinney), and the law firms of Bretz & Hennigan and Stoll & Stoll. Mullen & Stabile and their three associated firms continue to represent the class in Muller.

In August 1981, the four firms joined to file a new action against Touche Ross & Co., a partnership of certified public accounts, charging the firm with conducting improper audits, mainly through its Los Angeles office. All four firms continue to represent the class in Touche Ross, herein.

In September 1981, the three

associated firms filed an action against the Battistone defendants. Mullen & Stabile are conspicuous by their absence as counsel of record. Counts I through III of the Battistone complaint are virtually the same as those in Muller. In addition, a fourth count was added asserting a civil claim under the Racketeer Influenced and Corrupt Organizations Act of 1970. (The attempt to amend Muller to add such a count had been rejected by the district court.)

The defendants in the two actions now on appeal (Touche Ross and Battistone) moved to disqualify counsel for the class. The motion to disqualify was granted, motions to reconsider were denied, and these appeals followed.

The standard for our review of the

disqualification of attorneys is whether the district court abused its discretion. The district court has the primary responsibility for controlling the conduct of lawyers practicing before it. Unified Sewerage Agency, etc. v. Jelco Incorporated, 646 F.2d 1339, 1351 (9th Cir. 1981). The district court's order disqualifying counsel will not be disturbed if the record reveals "any sound basis" for the order and reversal is appropriate only if the district court "misperceives the law or does not consider relevant factors and thereby misapplies the law." In re Coordinated Proceedings, etc., supra, 658 F.2d at 1358. We find no abuse of discretion and appellants have demonstrated no misconception of the law in either of these appeals. We note, at the outset,

that both cases, as well as Muller, were assigned to the same district judge. He was thus in a unique position to observe the nature and the participation of counsel, thus far, as those cases have proceeded through his court.

The Touche Ross Appeal:

Gary Stabile of Mullen & Stabile defended Touche Ross as late as mid-1979, in a professional misconduct case centered mainly around the firm's Los Angeles office -- the same Touche Ross office that is involved in the Sambo's litigation. Moreover, he represented Touche Ross during the precise period that the events which are complained of in this appeal allegedly occurred. Affidavit evidence presented by Touche Ross states that Stabile had access to

its audit conversations with partners and employees in the accounting firm which were privileged, confidential and related to proprietary information. He received \$250,000 in legal fees for his representation of Touche Ross in that case.

In August 1981, he took the deposition of an official at Touche Ross and, while there is some conflict as to the precise course of events, an affidavit offered by Touche Ross indicates that it believed its deposition was being taken as a third party witness until the day of the deposition when it became apparent that Stabile was considering suing his former client. Indeed, he filed the complaint in the case the very next day -- within hours of the deposition.

We find no abuse of discretion in the disqualification of Mullen & Stabile; the district judge's order was well within the intent of Rule 4-101 of the Rules of Professional Conduct of the State Bar of California, which under Local Rule 1.3(d) of the United States District Court for the Central District of California is adopted for use in that court. See Chambers v. Superior Court, 121 Cal. App.2d 893 (1981). It was similarly within the intent of Canon 9 of the Model Code of Professional Responsibility of the American Bar Association. See In re Coordinated Proceedings, etc. supra, 658 F.2d at 1360-1361. The disqualification order, as to associated counsel, given the representational history of these several

cases, was also well within the district judge's discretion under Rule 1.3(d) and Canon 9.

We are not persuaded by appellants' argument that the former client had the duty to disclose, detail by detail, how the former litigation "related" to the matters charged in the Sambo's litigation. The record fully supports the district court's exercise of discretion to protect the former client who had done nothing to give consent to this present adverse representation by its former counsel.

The Battistone Appeal:

In the Battistone appeal the district judge had before him affidavit evidence in support of the motion for disqualification stating unequivocally that confidential information had been

given by the Battistone defendants to the original attorneys representing the class. Mr. Stabile substituted in, in place of those attorneys. He is conspicuously absent as counsel of record in Battistone but he and his associated counsel appear of record together in both Muller and Touche Ross. Opposed to the affidavits supplied by the Battistone defendants, was an affidavit from an attorney associated with the original (now substituted out) firm, denying that he had received confidential information and denying that he had corresponded on certain dates with the attorneys now representing the class in Battistone. Nothing is said by him as to communications, if any, with Mullen & Stabile. It is also noted that this

affidavit was first filed with appellants' motion for reconsideration, after the filing of the order for disqualification.

We have read the carefully worded affidavits and we have reviewed the record as a whole and we are confinned that, consistent with our usual practice, we should not interfere in the district judge's resolution of matters of credibility as to the factual issues underlying this decision to disqualify counsel. Moreover, we are not persuaded, on this record, that the Battistone defendants were required to carry a higher burden of proof as to the communication of confidentialities, proof which could only be speculative and which, by its disclosure, might result in the very violation of confidence that the

Rules of Professional Conduct are intended to protect. On the facts of this case, the district judge was not prohibited from acknowledging the relationship between Mullen & Stabile and the law firms it associated in the Sambo's cases, and was not prohibited from speculating on the reasons why the quartet had, for this case alone, become a trio.

With our affirmance of the disqualification of counsel based on these reasons, we need not reach the disturbing issue of the fourth member of the quartet in Muller and Touche ross stepping aside from formal representation of the class in Battistone, only to hear the remaining trio argue they were free to repudiate concrete assurances, given

by original class counsel, that the Battistone defendants would not be sued.

Counsel for the class in Battistone sought a reconsideration of the order for disqualification and, in the disposition of that motion, sanctions were imposed against counsel in the sum of \$250.00. We agree with them that there was insufficient notice and opportunity for them to oppose that action by the district judge.

The appeals in both cases, insofar as they seek to appeal from the dismissal of the actions without prejudice, are dismissed. The orders for disqualification are affirmed. The order, in Battistone, for sanctions is reversed and the case is remanded for the limited purpose of permitting a hearing.

If there is to be an appeal on the

results of this limited remand, the case will be returned to the same panel here.

FILED

Sep 27 1983

Phillip B.
Winberry
Clerk U.S.
Court of
Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILLIP EMRICH, and)
ERIC GILLBERG,)
Appellants,) No. 81-5940

vs.)

TOUCHE ROSS & CO.,)
Appellees.)

PHILLIP EMRICH,)
et al.,) No. 82-5356
Appellants,)

vs.)

SAM BATTISTONE, SR.,)
et al.,)
Appellees.)

ORDER DENYING
PETITION FOR
REHEARING

Before: CHAMBERS, ROBB and ALARCON,

Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Alarcon has voted to reject the suggestion for a rehearing en banc, and Judges Chambers and Robb have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX F

A-35

FILED

Oct 23 1981

Clerk,
U.S. District
Court Central
District of
California
By _____
Deputy

N. Robert Stoll
Jennifer Jacobs
STOLL & STOLL, P.C.
735 S.W. First Avenue
Portland, Oregon 97204
(503) 227-1601

J. Michael Hennigan
Roderick G. Dorman
Alan Pick
BRETZ AND HENNIGAN
A Law Corporation
124 Lasky Drive
Beverly Hills, California 90212
(213) 271-6201

Josef D. Cooper
Tracy R. Kirkham
300 Montgomery Street, Suite 600
San Francisco, California 94104
(415) 788-3030

Gerald Mullen
Gary D. Stabile
MULLEN & STABILE
Suite 400
10850 Wilshire Boulevard

Los Angeles, California 90024
(213) 474-9733

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH)	
AND ERIC GILLBERG,	)	Case
	)	No. CV 81-
Plaintiffs,	)	4104
)	
v.	)	DECLARATION OF
	)	N. ROBERT
TOUCHE, ROSS & CO.,	)	STOLL
)	
Defendant.)	

I, N. Robert Stoll declare:

1. I am an attorney at law duly licensed to practice before and admitted to practice before all courts in the State of Oregon and admitted to practice before this court in this matter. I am a member of the firm of Stoll & Stoll, P.C. one of attorneys for plaintiffs Phillip Emerick [sic] and Eric Gilberg

[sic]. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' co-counsel in the action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al. No. CV 80-3757-R (JRX) (the "Muller case".) Gary Stabile of the firm of Mullen & Stabile, is also one of plaintiffs' co-counsel in the Muller case.

3. At no time during the course of my representation of the plaintiff class in the Muller case or this case or in any other connection did Mr. Stabile provide any information to me regarding Touche Ross & Co. The decision to file this action against Touche Ross was made solely by Messers. Hennigan, Cooper and

myself. Mr. Stabile did not participate in the discussions leading to that decision, and it was in no way based on any information provided by or consultation with Mr. Stabile.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Beverly Hills,
California this 22nd day of October,
1981.

[signed]

N. Robert Stoll

FILED

Oct 23 1981

Clerk,
U.S. District
Court Central
District of
California
By _____
Deputy

N. ROBERT STOLL
JENNIFER JACOBS
STOLL & STOLL, P.C.
735 S.W. First Avenue
Portland, California [sic] 97204
Telephone: (503) 227-1601

J. MICHAEL HENNIGAN
BRETZ & HENNIGAN
124 Lasky Drive
Beverly Hills, California 90212
Telephone: (213) 271-6201

JOSEF D. COOPER
TRACY R. KIRKHAM
LAW OFFICES OF JOSEF D. COOPER, P.C.
300 Montgomery Street, Suite 600
San Francisco, California 94104
Telephone: (415) 788-3030

GARY D. STABILE
MULLEN & STABILE
Suite 400
10850 Wilshire Boulevard
Los Angeles, California 90024
Telephone: (213) 474-9733

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PHILLIP EMRICK [sic])	
AND ERIC GILLBERG,	)	Case
	)	No. CV 81-
Plaintiffs,	)	4104 IH
)	
vs.	)	DECLARATION OF
	)	<u>J. MICHAEL</u>
TOUCHE ROSS & CO.,	)	<u>HENNIGAN</u>
)	
Defendant.)	

DECLARATION OF J. MICHAEL HENNIGAN

I, J. Michael Hennigan, declare:

1. I am an attorney at law duly authorized to practice before this Court in this matter and licensed to practice before all courts in the State of California. I am a member of the firm of Bretz and Hennigan, one of attorneys for plaintiffs Phillip Emerick [sic] and Eric Gillberg. I have personal knowledge of

the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' counsel in the action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al. No. CV 80-3757-R (JRx) (The "Muller case".) Gary Stabile of the firm of Mullen & Stabile is also one of plaintiffs' counsel in the Muller case.

3. At no time during the course of my representation of the plaintiff class in the Muller case or in this action have I discussed with Mr. Stabile his former representation of Touche Ross & Co. Moreover, Mr. Stabile has not provided me with any information whatsoever regarding Touche Ross.

4. The decision to file the present action against Touche Ross was made solely by Messers. Josef D. Cooper, N. Robert Stoll and myself. Mr. Stabile did not participate in the discussions leading to this decision, nor was it based on any information provided by Mr. Stabile or any consultation with Mr. Stabile.

5. On August 11, 1981 I represented plaintiffs in the Muller case during the deposition of Mr. Richard Herrinton, who testified on behalf of Touche Ross. Prior to commencing the deposition I informed counsel for Mr. Herrinton, Jay R. Ziegler, Esq., that plaintiffs considered it a possibility that a lawsuit against Touche Ross, based upon transactions which are being litigated in the Muller case, might be appropriate. I further

stated that the testimony of Mr. Herrinton would be determinative of whether a lawsuit against Touche Ross would be appropriate.

5. [sic] After Mr. Herrinton had responded to a number of questions regarding Sambo's Restaurants, Inc., a break in the deposition was taken, at which time I stated to Mr. Ziegler that it appeared that, in light of Mr. Herrinton's testimony, a lawsuit against Touche Ross appeared appropriate and that it was almost certain that plaintiffs would file such a lawsuit.

6. [sic] Following notice to Mr. Ziegler of plaintiffs' intention, Mr. Ziegler refused to allow the deposition to continue.

7. [sic] A complaint against

Touche Ross & Co. was prepared that afternoon and evening and the following afternoon.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California
this 23rd day of October, 1981.

[signed]

J. Michael Hennigan

FILED

Oct 23 1981

Clerk,
U.S. District
Court Central
District of
California
By _____
Deputy

N. ROBERT STOLL
JENNIFER JACOBS
STOLL & STOLL, P.C.
735 S.W. First Avenue
Portland, California [sic] 97204
Telephone: (503) 227-1601

J. MICHAEL HENNIGAN
BRETZ & HENNIGAN
124 Lasky Drive
Beverly Hills, California 90212
Telephone: (213) 271-6201

JOSEF D. COOPER
TRACY R. KIRKHAM
LAW OFFICES OF JOSEF D. COOPER, P.C.
300 Montgomery Street, Suite 600
San Francisco, California 94104
Telephone: (415) 788-3030

GARY D. STABILE
MULLEN & STABILE
Suite 400
10850 Wilshire Boulevard
Los Angeles, California 90024
Telephone: (213) 474-9733

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PHILLIP EMRICK [sic])	
AND ERIC GILLBERG,	)	Case
	)	No. CV 81-
Plaintiffs,	)	4104 IH
)	
vs.	)	DECLARATION OF
	)	<u>JOSEF D.</u>
TOUCHE ROSS & CO.,	)	<u>COOPER</u>
)	
Defendants.)	

DECLARATION OF JOSEF D. COOPER

I, Josef D. Cooper, declare:

1. I am an attorney at law duly authorized to practice before this Court in this matter and licensed to practice before all courts in the State of California. I am a shareholder of the firm of Law Offices of Josef D. Cooper, P.C., one of attorneys for plaintiffs Phillip Emerick [sic] and Eric Gillberg.

I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' counsel in the action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al. No. CV 80-3757-R (JRx) (The "Muller case".) Gary Stabile of the firm of Mullen & Stabile is also one of plaintiffs' counsel in the Muller case.

3. At no time during the course of my representation of the plaintiff class in the Muller case or in this action have I discussed with Mr. Stabile his former representation of Touche Ross & Co. Mr. Stabile has not provided me with any information whatsoever regarding Touche

Ross. I was not aware of Mr. Stabile's former representation of Touche Ross until I received copies of Touche Ross's motions in this action.

4. The decision to file this action against Touche Ross was made solely by Messrs. Hennigan, Stoll, and myself. Mr. Stabile did not participate in the discussions leading to this decision, nor was it based on any information provided by or consultation with Mr. Stabile.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California
this 23rd day of October, 1981.

[signed]

Josef D. Cooper

FILED

Jan 11 1982

Clerk U.S.
District
Court
Central
Dist. of
Calif.

J. Michael Hennigan
Roderick G. Dorman
BRETZ AND HENNIGAN
A Law Corporation
124 Lasky Drive
Beverly Hills CA 90212
(213) 271-6201

Josef D. Cooper
Tracy R. Kirkham
Patricia Lee Connors
LAW OFFICES OF JOSEF D. COOPER
300 Montgomery Street, Suite 600
San Francisco CA 94104
(415) 788-3030

N. Robert Stoll
Jennifer Jacobs
STOLL & STOLL, P.C.
735 SW First Avenue
Portland, Oregon 97204
(503) 227-1601

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND)	
ERIC GILLBERG,)	
	)	No. CV 81-
Plaintiffs,	)	4547(JRx)
)	
v.	)	DECLARATION
	)	OF <u>GARY D.</u>
SAM BATTISTONE, SR.;	)	<u>STABILE</u>
SAM D. BATTISTONE,)	
JR.; F. NEWELL)	
BOHNETT; ROBERT HILD;)	
OWEN JOHNSTON; WILLIAM))	
L. WAGNER, SR., GEORGE))	
McKAIG; DANN V.)	
ANGELOFF; GEORGE A.)	
CAVELLETTO; and BRUCE)	
N. ANTICOUNI;)	
)	
Defendants.)	

I, Gary D. Stabile, declare:

1. I am an attorney at law duly authorized to practice before this court and licensed to practice before all courts in the State of California. I am a member of the firm of Mullen & Stabile.

2. I am one of plaintiffs' counsel in a related action before this court entitled James Muller, et al. v. Sambo's

Restaurants, Inc., et al., No. CV 80-3757-R (JRx) (the "Muller" case). By order of this court dated April 8, 1981 the firm of Mullen & Stabile was substituted as plaintiffs' attorney of record in this action in the place of Latham & Watkins. The firm of Mullen & Stabile never acted as co-counsel with the firm of Latham & Watkins in the representation of the Muller action.

3. At no time either before or during the course of my representation of the plaintiffs in the Muller case has the firm of Latham & Watkins provided me with confidential information whose source was identified as any of the defendants in this action. I have not relayed any information to Messrs. Cooper, Hennigan, or Stoll which was obtained from Latham &

Watkins regarding any of the defendants herein.

4. I did not participate in any discussion leading to the decision to file this action against these defendants.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California
this 8 day of January, 1982.

[signed]

Gary D. Stabile

FILED

Jan 4 1982

Clerk U.S.
District
Court
Central
Dist. of
Calif.

J. Michael Hennigan
Roderick G. Dorman
BRETZ AND HENNIGAN
A Law Corporation
124 Lasky Drive
Beverly Hills CA 90212
(213) 271-6201

Josef D. Cooper
Tracy R. Kirkham
Patricia Lee Connors
LAW OFFICES OF JOSEF D. COOPER
300 Montgomery Street, Suite 600
San Francisco CA 94104
(415) 788-3030

N. Robert Stoll
Jennifer Jacobs
STOLL & STOLL, P.C.
735 SW First Avenue
Portland, Oregon 97204
(503) 227-1601

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND)	
ERIC GILLBERG,)	
	)	No. CV 81-
Plaintiffs,	)	4547(JRx)
)	
v.	)	DECLARATION
	)	OF <u>N. ROBERT</u>
SAM BATTISTONE, SR.;	)	<u>STOLL</u>
SAM D. BATTISTONE,)	
JR.; F. NEWELL)	
BOHNETT; ROBERT HILD;)	
OWEN JOHNSTON; WILLIAM))	
L. WAGNER, SR., GEORGE))	
McKAIG; DANN V.)	
ANGELOFFF; GEORGE A.)	
CAVELLETTO; and BRUCE))	
N. ANTICOUNI;)	
)	
Defendants.)	

I, N. Robert Stoll declare:

1. I am an attorney at law fully licensed to practice before and admitted to practice before all courts in the State of Oregon and admitted to practice before this court in this matter. I am a member of the firm of Stoll & Stoll, P.C. one of the attorneys for plaintiffs

Phillip Emrich and Eric Gillberg. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' co-counsel in a related action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al., No. CV 80-3757-R(JRx) (the "Muller" case). I am also plaintiffs' counsel in John L. Hilts v. Sambo's Restaurants, Inc., et al., No. CV 81-147-R(JRx) (the "Hilts action") and Robert C. Robertson v. Sambo's Restaurants, Inc., et al., No. CV 81-153-R(JRx) (the "Robertson action"), which were transferred from the District of Oregon and consolidated with the Muller case. Prior to my being added as one of plaintiffs' counsel in the Muller case, the plaintiffs were represented solely by

the firm of Mullen & Stabile, and prior to that solely by the firm of Latham & Watkins.

3. On January, 1981, shortly after the Hilts and Robertson actions were transferred to this court from the District of Oregon, I met with Lance Wickman of Latham & Watkins. At that time the firm intended to resign from the Muller case. I did not receive from that firm then, or at any time, any deposition transcripts, other documents, or any substantive information regarding the merits of the Muller action.

4. At no time during the course of my conversation with Mr. Wickman, or at any other time, did Mr. Wickman or any other member of the firm of Latham & Watkins communicate any personal

information to me regarding those persons named as defendants in this action. Neither have Messrs. Mullen or Stabile communicated to me any information regarding these defendants which, to my knowledge, they obtained from Latham & Watkins.

5. The decision to file this action against these defendants was based upon information gained by me and my co-counsel in the course of discovery in the Muller case. No member of the firm of Latham & Watkins participated in the discussions leading to that decision, nor was that decision based upon any information provided by, or consultation with, the firm of Latham & Watkins.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sun River, Oregon this

31 day of December, 1981.

[signed]

N. Robert Stoll

FILED

Jan 4 1982

Clerk U.S.
District
Court
Central
Dist. of
Calif.

J. Michael Hennigan
Roderick G. Dorman
BRETZ AND HENNIGAN
A Law Corporation
124 Lasky Drive
Beverly Hills CA 90212
(213) 271-6201

Josef D. Cooper
Tracy R. Kirkham
Patricia Lee Connors
LAW OFFICES OF JOSEF D. COOPER
300 Montgomery Street, Suite 600
San Francisco CA 94104
(415) 788-3030

N. Robert Stoll
Jennifer Jacobs
STOLL & STOLL, P.C.
735 SW First Avenue
Portland, Oregon 97204
(503) 227-1601

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND)	
ERIC GILLBERG,)	
	)	No. CV 81-
Plaintiffs,	)	4547(JRx)
)	
v.	)	DECLARATION
	)	OF <u>J. MICHAEL</u>
SAM BATTISTONE, SR.;	)	<u>HENNIGAN</u>
SAM D. BATTISTONE,)	
JR.; F. NEWELL)	
BOHNETT; ROBERT HILD;)	
OWEN JOHNSTON; WILLIAM)	
L. WAGNER, SR., GEORGE)	
McKAIG; DANN V.)	
ANGELOFF; GEORGE A.)	
CAVELLETTO; and BRUCE)	
N. ANTICOUNI;)	
)	
Defendants.)	

I, J. Michael Hennigan, declare:

1. I am an attorney at law duly authorized to practice before this court in this matter and licensed to practice before all courts in the State of California. I am a member of the firm of Bretz & Hennigan, one of attorneys for plaintiffs Phillip Emrich and Eric

Gillberg. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' counsel in a related action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al., No. CV 80-3757-R(JRx) (the "Muller case"). Prior to the time I was added as plaintiffs' counsel in the Muller case, plaintiffs were represented solely by the firm of Mullen & Stabile, and prior to that time solely by the firm of Latham & Watkins.

3. At no time either before or during the course of my representation of the plaintiffs in the Muller case have I had any discussions with any member of the firm of Latham & Watkins. Latham & Watkins has not provided me with any

information whatsoever regarding the prosecution of the Muller case, or the facts or legal theories known to or discovered by Latham & Watkins during or in preparation of their representation of the Muller plaintiffs. Neither has any information been relayed to me by Messrs. Mullen or Stabile which, to my knowledge, was obtained from Latham & Watkins regarding any of the defendants herein or any aspect of this litigation.

4. The decision to file this action against these defendants was based upon information gained in the course of discovery undertaken by me and my co-counsel in the Muller action. No member of the firm of Latham & Watkins participated in any discussion leading to that decision, nor was that decision

based upon any information provided by,
or consultation with, any member of the
firm of Latham & Watkins.

I declare under penalty of perjury
that the foregoing is true and correct.

Executed at Los Angeles, California
this 2d day of January, 1982.

[signed]

J. Michael Hennigan

FILED

Jan 4 1982

Clerk U.S.
District
Court
Central
Dist. of
Calif.

J. Michael Hennigan
Roderick G. Dorman
BRETZ AND HENNIGAN
A Law Corporation
124 Lasky Drive
Beverly Hills CA 90212
(213) 271-6201

Josef D. Cooper
Tracy R. Kirkham
Patricia Lee Connors
LAW OFFICES OF JOSEF D. COOPER
300 Montgomery Street, Suite 600
San Francisco CA 94104
(415) 788-3030

N. Robert Stoll
Jennifer Jacobs
STOLL & STOLL, P.C.
735 SW First Avenue
Portland, Oregon 97204
(503) 227-1601

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND)	
ERIC GILLBERG,)	
	)	No. CV 81-
Plaintiffs,	)	4547 (JRx)
)	
v.	)	DECLARATION
	)	OF <u>JOSEF C.</u>
SAM BATTISTONE, SR.;	)	<u>COOPER</u>
SAM D. BATTISTONE,)	
JR.; F. NEWELL)	
BOHNETT; ROBERT HILD;)	
OWEN JOHNSTON; WILLIAM)	
L. WAGNER, SR., GEORGE)	
McKAIG; DANN V.)	
ANGELOFFF; GEORGE A.)	
CAVELLETTO; and BRUCE)	
N. ANTICOUNI;)	
)	
Defendants.)	
)	

I, Josef D. Cooper, declare:

1. I am an attorney at law duly authorized to practice before this court in this matter and licensed to practice before all courts in the State of California, and am one of the attorneys for plaintiffs Phillip Emerich and Eric Gillberg. I have personal knowledge of

the facts stated herein, and if called as a witness, I could competently testify thereto.

2. I am one of plaintiffs' counsel in a related action before this court entitled James Muller, et al. v. Sambo's Restaurants, Inc., et al., No. CV 80-3757-R(JRx) (the "Muller case"). Prior to the time I was added as plaintiffs' counsel in the Muller case, plaintiffs were represented solely by the firm of Mullen & Stabile, and prior to that time solely by the firm of Latham & Watkins.

3. At no time either before or during the course of my representation of the plaintiffs in the Muller case have I had any discussions with any member of the firm of Latham & Watkins. Latham & Watkins has not provided me with any information whatsoever regarding the

prosecution of the Muller case, or the facts or legal theories known to or discovered by Latham & Watkins during or in preparation of their representation of the Muller plaintiffs. Neither has any information been relayed to me by Messrs. Mullen or Stabile which, to my knowledge, was obtained from Latham & Watkins regarding any of the defendants herein or any aspect of this litigation.

4. The decision to file this action against these defendants was based upon information gained in the course of discovery undertaken by me and my co-counsel in the Muller action. No member of the firm of Latham & Watkins participated in any discussion leading to that decision, nor was that decision based upon any information provided by,

or consultation with, any member of the firm of Latham & Watkins.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California this 4th day of January, 1982.

[signed]

Josef D. Cooper

FILED

Jan 11 1982

Clerk U.S.
District
Court
Central
Dist. of
Calif.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP EMRICH AND ERIC)
GILLBERG,)

Plaintiffs,)

v.)

SAM BATTISTONE, SR.,;)
SAM D. BATTISTONE, JR.;)
F. NEWELL BOHNETT; ROBERT)
HILD; OWEN JOHNSTON;)
WILLIAM L. WAGNER, SR.;)
GEORGE MCKAIG; DANN V.)
ANGELOFF; GEORGE A.)
CAVELLETTO; and BRUCE N.)
ANTICOUNI;)

Defendants.)

No. CV 81-
4547 (JRx)DECLARATION
OF LANCE B.
WICKMAN

I, Lance B. Wickman, declare:

1. I am an attorney licensed to
practice in the State of California and

before this Court and I am a member of the firm of Latham & Watkins, which formerly was counsel of record for plaintiffs in the action entitled Muller, et al. v. Sambo's Restaurants, Inc., et al., No. CV 80-3757-R(JRx) ("the Muller case"). I am competent to testify. The facts set forth herein are of my own personal knowledge, and if called upon to do so I could and would do so as set forth herein.

2. Latham & Watkins was first retained by a steering committee of two associations, JV Group Association and JV 77-78 Group Association, to represent them in a dispute with Sambo's Restaurants, Inc. ("SRI"), United California Bank (now First Interstate Bank) and Crocker Bank in approximately

April 1980. The two organizations were loose associations of persons who had invested in various group joint ventures and restaurant joint ventures sponsored by SRI. As I recall, the steering committee members with whom we dealt were Robert Elmerick and Oliver Dixon and, to a lesser extent, Helene Sullivan. None of the defendants in this action to my knowledge were members of the steering committee or in any way involved in the management of these two associations.

3. At the request of the steering committee and the named plaintiffs in the Muller case, we filed the Muller action, opposed motions to dismiss by the defendants in that action and moved for certification of the class. One of the contentions raised by defendant SRI in opposition to class certification was

that Latham & Watkins could not be certified as class counsel because allegedly certain members of these associations which Latham & Watkins represented (former officers and directors) had interests adverse to putative class members. As mentioned in the reply memorandum filed by Latham & Watkins and by me at the hearing, that contention was totally without merit since none of those who had been directors or corporate officers of SRI, and thus potentially subject to liability, were in any way involved in the representation of the class or the management of the associations. The Court evidently agreed that the contention lacked merit because it certified the class and Latham & Watkins

as class counsel and expressly excluded former officers and directors from the class.

4. To my knowledge I have not even met any of those persons named as defendants in this action, much less received any confidential communications from them.

5. In or about February 1981 I met briefly with Mr. N. Robert Stoll, one of plaintiffs' counsel in this action, prior to attending a meeting of all counsel in the Muller case regarding a discovery schedule. The sole purpose of my discussion with Mr. Stoll was to coordinate our respective lists of prospective deponents since at the time he was representing plaintiffs in two actions related to, and in the process of consolidation with, the Muller case. I

did not discuss with him any other information received from our clients, and obviously could not have discussed any "confidential information" from defendants here since, as mentioned, I never received any.

6. Similarly, I never communicated any such confidential information to Messrs. Mullen and Stabile when they succeeded Latham & Watkins as class counsel.

Executed at San Diego, California on January 6, 1982.

I declare under penalty of perjury that the foregoing is true and correct.

[signed]

Lance B. Wickman